

# **Summary of Findings for Special Use Authorizations for Water Facilities Involved in the Wilson Peak Land Exchange**

Prepared by Linda Bledsoe, Realty Specialist, Grand Valley Ranger District September 29, 2014

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## **INTRODUCTION**

The following water facilities are located on both National Forest System (NFS) lands and private lands in the vicinity of the Wilson Peak Land Exchange Properties. As part of the analysis being done for the Wilson Peak Land Exchange, their water rights and authorization status is needed.

Many of these facilities were constructed in the early 1900s and, therefore, it can be unclear as to whether an authorization exists. Water facilities built around that time could have been authorized as easements under the Acts of July 26, 1866 (1866 Act), and the Act of March 3, 1891 (1891 Act).

Some of the confusion about authorizations for these water developments might also arise from uncertainty about whether mining claims (on which some of the facilities were constructed) were patented.

## **ACT OF JULY 26, 1866**

In order for the Forest Service to administratively recognize the existence of an 1866 Act easement, several criteria must be met; and each of these is discussed for each facility. Following are the criteria.

### ***1. Evidence of a Right to the Diversion and Use of Water***

Much of the evidence as to whether an Act of July 26, 1866, easement (RS 2339) right to the use and occupancy of National Forest System (NFS) lands exists is dependent upon whether you can show that there was a locally recognized/acknowledged right to the use of water. That often is best demonstrated with evidence of a vested or certificated water right from the State, having an identified "priority date" (adjudication date) for the use, diversion, transport, and/or storage of the water for which the subject facility was constructed. The appropriation date for a water right is not enough to prove that a facility had been constructed and was in use at the time the forest was reserved. The reservation date for the Uncompahgre National Forest in the area of the water facilities is March 2, 1907.

### ***2. Evidence of when the Facility was Constructed and Made Operational***

RS 2339 rights are limited to the facilities that actually existed as of the date of reservation of the subject land (when the land was reserved from the public domain for forest reserve/national forest purposes (March 2, 1907).

### ***3. Evidence of Continuous Operation and Use***

In addition to the two tests above (land was still public, and water right was secured), for an RS 2339 outstanding right to be valid today, the subject facility must have been in relatively continuous use since construction without "abandonment". Evidence to demonstrate relatively continuous use may be needed in certain cases where on-the-ground conditions (vegetation, condition of the facilities, etc.) suggest the possibility of prolonged periods of nonuse.

The Forest Service has no statutory authority to recognize 1866 Act easements. The only way to perfect an 1866 Act easement is for the owner of the facility to file a Quiet Title Act suit with a federal court of

competent jurisdiction. Although the Forest Service has recently started issuing administrative acknowledgements of a “potentially valid prior right,” the court action still remains the only way to perfect the easement. Those who receive those administrative acknowledgements are advised of that requirement. Should that court action not occur and new guidance or interpretation (usually through court action) be issued, those administrative acknowledgements can be overturned.

### **ACT OF MARCH 3, 1891**

Easements under this act (also known as the Creative Act) were granted by the General Land Office (GLO) after the reservation dates of the national forests where the facilities exist. There is no actual document entitled “Act of March 3, 1891, Easement;” however, there are usually records available showing that an easement was granted.

- ***Application for easement:*** The application for an 1891 easement consisted of a plat showing the water facility to be constructed that was submitted to the local General Land Office. If the facility was to be located on NFS lands, the GLO would forward the plat to the Forest Service asking if the proposed facility would interfere with other uses already existing on the NFS lands. Some of these uses could be withdrawals. At this time, the GLO assigned a serial number to the application; and that number bears.
- ***Stipulations executed with the Forest Service:*** Because the facilities would be located on NFS lands, the applicant was required to enter into stipulations with the Forest Service. Many of the stipulations were similar to the terms and conditions contained in special use permits. There are instances, in the case of facilities to be constructed on unsurveyed, reserved lands, where special use permits were issued instead. In any case, an agreement between the Forest Service and the applicant had to be executed.
- ***Proof of construction decision:*** Once the application was approved after execution of the stipulations, the applicant then had five years in which to complete construction. If that was not possible, the applicant could request an extension of time. Very few of those facilities were completed within that time frame, and there are instances where it took 35 to 40 years to complete. Once construction was completed, the GLO required the Forest Service to submit a construction report. If everything was satisfactory, the GLO then issued a decision letter documenting that construction was complete. It was at that time, the easement vested; and whatever was constructed at that time constituted the easement. If the facility was smaller than was planned, the GLO required the applicant to relinquish the rest of the area. There has been some discussion in files that, if the facility was built substantially as planned, no proof of construction decision was needed. Any enlargement after the easement vests required additional authorization.

Documentation as to the existence of 1891 easements can be found in several places. The Bureau of Land Management (BLM), as caretaker of all federal land status records, maintains databases (especially LR2000) that can show information pertaining to 1891 Act easements. That database is generally the most reliable source of information pertaining to those easements. Additionally, the 1986 Ditch Bill Act (P.L. 99-545) transferred jurisdiction and authority for administration of 1891 Act easements on NFS lands to the Forest Service. The Rocky Mountain Regional Office has most, if not all, of the original case files for those 1891 Act easements in their records. If documentation cannot be found in either of those two places, it generally means that an easement either never existed or it was relinquished at some point.

The Federal Land Policy and Management Act of October 21, 1976, as amended (FLPMA), revoked the prior laws; however, those easements already in effect under either the 1866 or 1891 Acts remained valid. For information purposes, an 1891 Act easement could be granted by the Bureau of Land Management, even on NFS lands, until the passage of FLPMA.

**ALTA RESERVOIR NO. 1, NO. 2 AND NO. 3 – Owner: Alta Lakes, LLC**

***Water Rights:***

Appropriation Date	Adjudication Date	Amount Decreed (Absolute)	Beneficial Use(s)
<b><i>No. 1</i></b>			
07/02/1916	02/26/1929	32.6 acre-feet (AF)	Commercial, industrial, fire, domestic
<b><i>No. 2</i></b>			
07/02/1916	02/26/1929	30.9 AF	Fire
07/02/1916	02/26/1929	48.4 AF	Commercial, industrial, fire, domestic
<b><i>No. 3</i></b>			
07/02/1916	02/26/1929	44.8 acre-feet	Commercial, industrial, fire, domestic
07/02/1916	02/26/1929	14.3 acre-feet	Commercial, industrial, fire, domestic

On November 15, 1907, the Alta Mines Company filed a petition with the District Court in Montrose for adjudication of beneficial uses other than irrigation. The petition states that the only general adjudication done in the district was in 1897 but only for irrigation. In what appears to be support for the petition a statements of claim was filed in 1908 by George R. Dolf; and, in 1911, Charles E. Wild applied for adjudication of the water rights. However, after hearing various testimonies, the referee for the case wrote that “the acts taken by the claimant were insufficient to constitute an appropriation or to warrant the referee in finding that any appropriation of water in said reservoirs was thereby made.”

It appears that there might have been competing interests in these three reservoirs, which some called Nunn Reservoirs 1, 2 and 3. The location of the Nunn Reservoirs was identical to that of the Alta Reservoirs. There is some discussion in the records of a court case going all the way to the Colorado Supreme Court before it was decided in favor of the Alta Mines Company.

On November 9, 1926, John M. Wagner filed another statement of claim for water rights, in the Montrose District Court. According to sworn testimony by George G. Wagner (brother of John Wagner) in support of this claim, the Alta Mines Company subsequently “became bankrupt,” and the property was sold to Thomas E. Wild, then to Wagner Development and Mining Company, and then to claimant John M. Wagner. In John Wagner’s claim, he stated that the water had been used for power, mining, milling, manufacturing and domestic purposes. The decrees for the three reservoirs and the Alta Pipeline were issued to John M. Wagner on February 26, 1929, with an appropriation date established as July 2, 1916. All of the decrees state the beneficial use is “milling” purposes, even though Mr. Wagner’s statement of claim mentioned other uses. It could be that “commercial, industrial, fire and domestic” are included in milling purposes.

Because the purpose of this research is to determine whether or not an 1866 Act easement might exist for the reservoirs, the appropriation and adjudication (when the right vested) are more important than the decreed beneficial use.

Although the testimony and decrees all state that work began in 1882, the court did not recognize it as the appropriation date. In 1911, the water court referee did not recognize that enough work had been done on the reservoirs to award an appropriation date. Only in 1929 did the court finally recognize the 1916 appropriation date and the absolute water right was awarded. It was not until then that the water right “vested.” Despite that information, it appears that the Forest Service believed an 1866 Act easement was in place for the reservoirs, likely based on the statements that work began in 1882 and construction was might have been completed prior to the reservation date of the Forest.

In 1964, the Forest Service filed a plat with the State Engineer’s Office that appears to document “Enlargement Number Two” of the reservoir, which would have increased the amount of water stored by 24.68 AF. There is nothing in the file or the CDSS water rights tabulation to indicate that this enlargement was ever done.

Starting in the mid-1960s, the Forest Service expressed concern about the integrity of the three dams to both the State Engineer’s Office and the owner of the reservoirs at that time, Silver Mountain Industries. Despite the State Engineer’s Office having sent directives to the reservoir owners, it appears that no repairs were done. The Forest Service attempted to require “stipulations” to be entered into in order to get the reservoirs fixed. The Forest Service requested guidance from the BLM about the possibility of requiring execution of stipulations for repair done on the dams authorized by an 1866 Act easement; however, the BLM responded that the Forest Service could not require stipulations.

It does not appear that any remedial work was done on the dams; and, in the early 1970s, the dam on Alta Reservoir No. 2 failed, causing substantial damage to the surrounding NFS lands. The State Engineer’s Office threatened to file suit in order to get the owners to release the water from the reservoirs to prevent further damage. And, the Forest Service filed a civil suit to recover money to repair damage. The Forest Service and the reservoir owners settled and worked together to effect repairs.

#### ***Authorizations:***

1866 Act: It appears that the Forest Service previously assumed that an 1866 Act easement was in place for the three reservoirs. The reservoirs do meet two of the three criteria for establishment of an 1866 Act easement. According to documents filed with the State and the Forest Service, work might have started in 1882 and might have been completed in 1904, which is prior to the March 2, 1907, reservation date for the Uncompahgre National Forest. However, further research into the water rights documents shows that there was enough doubt about the status of the facilities that no appropriation date was even awarded until 1916.

The water rights also appear to have in substantially continuous use since their construction.

However, in order for water rights to “vest” in Colorado and the priority set, they must be adjudicated through court action as absolute (meaning the facility is constructed and the water is being used). The water rights for the reservoirs were not adjudicated until 1929, well after the reservation date of the forest. There are those who point to the appropriation date as the priority date, which is not the case under Colorado water law. However, even it were, the appropriation date for the three reservoirs was July 2, 1916.

Based on the Forest Service’s assumption that an 1866 Act easement was in place, the owner of the facilities could have filed suit in a federal court to perfect that easement. However, there is no indication that was done. Therefore, with current direction and guidance being used, I do not believe an 1866 Act easement has ever existed for the three reservoirs.

- **Conclusion:** Alta Reservoir No. 1, 2 and 3 do not qualify for administrative acknowledgement of an easement under the Act of July 26, 1866.

1891 Act: There are no records for the reservoirs in either the files at the Regional Office or in LR2000. Therefore, we do not believe that an 1891 Act easement exists. That is probably because it had been assumed that an 1866 Act existed.

Special Use Permit: Because the Forest Service appears to have administered the reservoirs as if they had 1866 Act easements, there is no special use permit issued for them.

***Recommendation:***

Because of the findings in this document and the fact that the reservoirs will still occupy NFS lands after the exchange is completed, it appears that new FLPMA special use permits should be issued. My recommendation would be to include all three reservoirs, the Alta Pipeline and Turkey Creek Pipeline as a “system” in one permit.

**ALTA PIPELINE – Owner: Alta Lakes, LLC**

***Water Rights:***

Appropriation Date	Adjudication Date	Amount Decreed (Absolute)	Beneficial Use(s)
07/17/1898	10/31/1911	.36 cubic feet/second (cfs)	Commercial, municipal, fire, domestic

On January 13, 1908, Albert C. Koch, Vice-President of the Alta Mines Company, submitted a statement of claim for the water right for the “Alta Pipeline and Water Right.” Later, the same Charles E. Wild that filed for water rights on the reservoirs also filed for the pipeline. The decree indicates that the Alta Mill, which was served by the Alta Pipeline, was formerly known as the Bessie Mill. The water for that mill was furnished through a ditch known as the Georgiana Ditch, which diverted its supply of water from Turkey Creek a short distance below the head gate of the Alta Pipeline and Water Right. Further, the decree states that construction of the Georgiana ditch started on July 17, 1898, and was completed within a reasonable time thereafter. The ditch carried 0.3573 cfs of water, which was used at the Bessie Mill until about the fall of 1904. Because of seepage (“waste water”) that can occur from an open ditch, the length of the ditch, and the effect of winter weather on the flow in the ditch, a pipeline was installed and known as the Alta Pipeline and Water Right. Once the pipeline was installed, the ditch was abandoned. Documentation states that the pipeline is 1,900 feet long and is 3 inches in diameter, and the water is used for mining, milling and domestic purposes.

***Authorizations:***

1866 Act: As in the case of the Alta Reservoirs, it appears that the Forest Service believed the Alta Pipeline also had an 1866 Act easement. There is no indication that a federal court action was undertaken to perfect an 1866 Act easement, and there is no indication in LR2000 of an 1866 Act easement being recognized in any other manner. Under current guidance, the fact that the water rights did not vest until 1911, after the 1907 reservation date, makes the facility ineligible for recognition as an 1866 Act easement.

1891 Act: There are no records for the Alta Pipeline in either the files at the Regional Office or in LR2000. Therefore, we do not believe that an 1891 Act easement exists. That is probably because it had been assumed that an 1866 Act existed.

Special Use Permit: Because the Forest Service appears to have administered the pipeline as if it had an 1866 Act easement, there is no indication a special use permit was ever issued.

***Recommendation:***

It appears that all, or at least a part, of the Alta Pipeline will be located on private land owned by the proponent after completion of the land exchange (Federal Parcel 3D). If that is the case, no easement needs to be put in place because the proponent also holds the water rights. If a portion of the pipeline remains on NFS lands, it should be authorized by a special use permit and could be included in the “system” permit for the Alta Reservoirs and Turkey Creek Lake Pipeline.

**TURKEY CREEK LAKE PIPELINE -- Owner: Alta Lakes, LLC*****Water Rights:***

Appropriation Date	Adjudication Date	Amount Decreed (Absolute)	Beneficial Use(s)
10/22/1926	11/01/1939	3 cfs	Commercial, industrial, domestic

It appears that Turkey Creek Lake Ditch and Turkey Creek Lake Pipeline have both been used as names for this facility. To show that, the decree issued in 1939 starts with, “That said ditch, or pipeline, is entitled to Priority No. 263.” The decree states that the headgate for the ditch is at southwest end of Turkey Creek Lake, which appears to be Alta Reservoir No. 3 from maps in the land exchange project file. The water rights decree was issued to the Alta Mines, Incorporated, and found that the water rights had never been presented for decree in any of the previous adjudication proceedings in the water district. The court found that construction started on or about June 1, 1908, and that, when completed, the pipeline had a carrying capacity of 3 cfs. The pipeline was about 3,500 feet long, with a diameter of 4 inches. About one-third of the pipeline’s water was used for domestic purpose for 100 to 175 people employed at the Alta Mill, and two-thirds was used for milling purposes for the reduction of ore. The Statement of Claim for the water rights stated that the water was used for milling, domestic and fire protection purposes.

***Authorizations:***

1866 Act: Because no special use permit appears to have ever been issued for this facility, it could be that the Forest Service believed an 1866 Act easement was in place. The fact that water rights were not decreed until 1939 disproves that. The appropriation date (October 22, 1926), too, is after the reservation date of the forest; and the “priority” date mentioned in the decree is June 1, 1908, which is also after the reservation date of March 2, 1907. There is no indication that a federal court action was undertaken to perfect an 1866 Act easement, and there is no indication in LR2000 of an 1866 Act easement being recognized in any other manner. Therefore, an administrative acknowledgment of an 1866 Act easement is not appropriate for this facility.

1891 Act: There are no records for the Turkey Creek Lake Pipeline in either the files at the Regional Office or in LR2000. Therefore, we do not believe that an 1891 Act easement exists. That is perhaps because it had been assumed that an 1866 Act existed.

Special Use Permit: Because the Forest Service appears to have administered the pipeline as if it was authorized by an 1866 Act easement, there is no special use permit issued for it.

***Recommendation:***

Some of the NFS lands crossed by the Turkey Creek Lake Pipeline (Federal Parcel 3D) will be conveyed into private ownership; however, it appears that a portion of the pipeline will still cross NFS lands after the exchange. Because of that, a FLPMA special use permit should be issued for the portion still located on NFS lands. This pipeline could be included in a “system” permit, along with the Alta Reservoirs and, perhaps, the Alta Pipeline.

**BOULDER PLACER DITCH– Owner: Alta Lakes, LLC*****Water Rights:***

Appropriation Date	Adjudication Date	Amount Decreed (Absolute)	Beneficial Use(s)
07/29/1901	10/31/1911	.65 cfs	Fishery

The decree for the “Boulder Placer Ditch and Water Right” was issued on October 31, 1911, to Gus Cushman and states that the ditch diverts water out of Ames Creek, also known as Lion Creek, and conveys that water to Chatauqua Lake (aka Cushman Lake) and certain other lakes and points for fish culture and for raising fish for market. Construction on the ditch appears to have started on July 29, 1901, which is the appropriation date described above. The ditch is described as being 2 feet wide at the bottom, 3½ feet wide at the top and 1 foot deep, with a carrying capacity of 1 cfs. The claimant said that the water was used for irrigation, in addition to fish culture; however, the referee for the case could not find sufficient evidence to determine the amount of water used for irrigation purposes or the amount of water necessary for irrigation purposes and declined to award a decree for that use. It appears that the diversion point is near Hiker Lake and both the diversion point and the ditch are on private land.

***Recommendation:***

Because the facility is on private land, no action is necessary on the part of the Forest Service.

**GOLD KING PIPELINE– Owner: Alta Lakes, LLC*****Water Rights:***

Appropriation Date	Adjudication Date	Amount Decreed (Absolute)	Beneficial Use(s)
10/22/1926	11/01/1939	3.5 cfs	Municipal, commercial, domestic

The water rights decree for the Gold King Pipeline was issued on November 1, 1939, to Alta Mines, Incorporated, and stated that the pipeline’s water was taken from a small lake at the head of Gold King Basin on the Komo and Bessie Lodes. The pipeline was described as being 4,000 feet long, with a diameter of 4 inches. The decree adds that the Gold King Pipeline was used in conjunction with the Turkey Creek Lake Pipeline and that both lines were needed for the milling and domestic purposes of the claimant. The decree says that construction of the pipeline started on or about June 1, 1908 (after the reservation date of the Uncompahgre National Forest), and was completed to a carrying capacity of 3.5 cfs for domestic and milling purposes. The statement of claim filed by the Alta Mines, Incorporated, listed the beneficial uses as milling, domestic and fire protection purposes.

***Authorizations:***

1866 Act: Because no special use permit appears to have ever been issued for this facility, it could be that the Forest Service believed an 1866 Act easement was in place. The fact that water rights were not decreed until 1939 disproves that. As stated above, even the date construction supposedly commenced is after the date of forest reservation in the area. There is no indication that a federal court action was undertaken to perfect an 1866 Act easement, and there is no indication in LR2000 of an 1866 Act easement being recognized in any other manner. Therefore, an administrative acknowledgment of an 1866 Act easement is not appropriate for this facility.

1891 Act: There are no records for the Gold King Pipeline in either the files at the Regional Office or in LR2000. Therefore, we do not believe that an 1891 Act easement exists. That is probably because it had been assumed that an 1866 Act existed.

Special Use Permit: Because the Forest Service appears to have administered the pipeline as if it was authorized by an 1866 Act easement, there is no special use permit issued for it.

***Recommendation:***

A portion of the Gold King Pipeline is located on private lands, which are proposed to be conveyed into federal ownership (Federal Parcel 3D). The proponent (and holder of the water rights for the pipeline) might want to consider reserving an easement for that portion of the pipeline in the warranty deed. The remainder of the pipeline will still be located on NFS lands, and a new FLPMA permit should be issued for that portion. An operation and maintenance (O&M) plan will be required for the pipeline, even with the reservation.

**CHATAUQUA, ENTERPRISE AND SKYLINE MAIN SERVICE DITCH SYSTEM**

These three ditches will be discussed together because it appears that the ditches could be segments of the same ditch.

**ENTERPRISE DITCH**

***Water Rights***

Appropriation Date	Adjudication Date	Amount Decreed (Absolute)	Beneficial Use(s)
07/10/1902	06/03/1911	.5 cfs	Irrigation

The 1911 decree was issued to Hannah Bonner and states that the water is taken out of Turkey Creek for the irrigation of Mrs. Bonner's private land. The decree describes the ditch as being 1 foot wide on the bottom, 2 feet wide on the top, and 18 inches deep.

In the 1971 referee's ruling, the .5 cfs was split evenly among the Farnys and Goldsworthys. The Farnys were awarded .08 cfs (absolute) and .17 cfs (conditional until proof of actual use of the water for the stated purpose was shown). The Goldsworthys were awarded .02 cfs absolute and .23 cfs conditional.

**CHATAUQUA DITCH**

***Water Rights***

Appropriation Date	Adjudication Date	Amount Decreed (Absolute)	Beneficial Use(s)
03/28/1900	10/31/1911	.47 cfs	Fishery

The water rights decree for the Chatauqua Ditch was issued to Gus Cushman on October 31, 1911. It appears that Mr. Cushman also used the water for irrigation purposes; however, the referee noted that he was not allowed to grant a priority date for irrigation use in the adjudication. No additional uses are shown in the CDSS water rights tabulation. The ditch is described as being 1½ feet wide on the bottom, 2½ feet wide on the top and 1½ feet deep; and its carrying capacity is described as being "50 statute



inches.” The water is conveyed from the headgate to “certain lakes and ponds being 6 in number, and the largest lake being known as Chatauqua Lake (aka Cushman Lake), and the waters of said ditch are used in said lakes for fish culture and raising fish for market.” In the referee’s recommendation, he notes that there is a parallel ditch, known as Chatauqua Ditch No. 2, but recommends that water rights be granted only to Chatauqua Ditch.

### **SKYLINE MAIN SERVICE DITCH**

#### ***Water Rights***

Appropriation Date	Adjudication Date	Amount Decreed (Absolute)	Beneficial Use(s)
07/10/1902	12/31/1971	4.75 cfs	Irrigation, fishery (absolute flood water decree)

It appears that there was disagreement in the early 1970s between two landowners (Farnys and Goldsworthys) over whose water flowed through the three ditches. The Chatauqua and Enterprise Ditches had already been decreed, and it appears that a water rights application for the Skyline Main Service Ditch caused the issues between the landowners.

In his 1972 ruling, the water referee states, in part, “that, although springs, creeks, and ditches have been renamed and uses somewhat altered, the Chatauqua Ditch, The Enterprise Ditch, and now the Skyline Creek Main Service Ditch are all or in part, the same and derive their source of water supply from the same springs.” It further states that the total water decreed to the original Chatauqua and Enterprise Ditches, being .97 cfs, represents essentially all of the normal flow of the source springs. The ruling in the case granted 4.75 cfs of water rights from runoff to be “applied to the beneficial use by all parties.”

#### ***Ownership***

On August 6, 1984, Sharon S. Farny, conveyed a parcel of land totaling 35.16 acres, more or less, in the W½NE¼ Section 20, T. 42 N., R. 9 W., NMPM, to John David Crow by warranty deed. The deed also conveyed “water rights, as follows: one-half (0.5) cubic feet per second, with point of diversion being the western part of Beaver Springs Pond which pond is divided by the eastern boundary of said lot or parcel near its southern extremity” to John David Crow. On July 24, 1996, a “clarification of prior deed” was executed by Sharon Farny that stated the intent of Mrs. Farny was that the 0.5 cfs water right “be a portion of the water rights decreed by the District Court in and for Water Division No. 4 in Case Nos. W-248, W-249, and W-285.” The case numbers refer to decrees for the Skyline Main Service Ditch, the Chatauqua Ditch, Fisherman Lake, Hiker Lake, and other facilities included in the “system” associated with the three ditches. The deed also confirmed, ratified and accepted the conveyance by John David Crow to Margaret Crow. On July 25, 1996, Margaret Crow conveyed property and those water rights to Vincent A. Mai.

On October 15, 2004, the Farnys conveyed the remainder of their property and water rights to Skyline Ranch Trust, LLC.

Alta Investments, LLC, acquired the Goldsworthy property and associated water rights on April 3, 2009.

In 2010, Skyline Ranch Trust, LLC, the proponent in the land exchange, submitted a water rights application for surface water rights, surface water storage rights and approval of a plan of augmentation. In that application, it was acknowledged that the diversion point for the three ditches was on land owned by the Mais. In the 2013 decree issued in response to the application, the judge cites the decree and an operating agreement Skyline Ranch Trust, LLC (Skyline Ranch), entered into with Alta Investments, LLC (Alta), and made the following determination:

- Any flows up to 0.47 cfs would be booked as diversion of the Chatauqua Ditch water right;

- Any flow in excess of 0.47 cfs and up to 0.97 cfs (up to a total of 0.50 cfs) would be booked and accounted for as diversion of the Enterprise Ditch water right;
- Any flows in excess of 0.97 cfs would be booked and accounted for as diversion of the Main Service Ditch water rights (owned 50% by Alta and 50% by Skyline), with all such waters to be delivered through the Skyline Ranch water system for use by Skyline and subsequent use by Alta pursuant to the terms of the Operating Agreement.

Although the common diversion point for the ditches is located on private property owned by the Mais, there does not appear to be an operating or access agreement between the proponent and the Mais.

### **Recommendation:**

It appears that the operating agreement between the proponent and Alta will protect Alta's interests. However, no similar agreement appears to exist between the proponent and Vincent Mai.

**Other Facilities:** These ditches, along with several springs and lakes/ponds, form a "system." Following are those other facilities included in that system with a brief explanation of where they are located and whether or not any authorization was issued in the past. Although water rights documentation exists for all of the facilities associated with the ditch "system," there is a dispute between the Proponent and Mr. Mai about those water rights. Sorting out that dispute is more appropriately the role of a water court and not the Forest Service. However, from all of the information reviewed, the Forest Service believes the exchange Proponent to be a holder of water rights in the following facilities:

- Skyline (aka Cushman) Spring No. 1 – located on NFS lands with no Forest Service authorization in place. The affected NFS lands will be conveyed to the proponent;
- Skyline Spring No. 2 – located on NFS lands with no Forest Service authorization in place. The affected NFS lands will be conveyed to the proponent;
- Skyline Spring No. 3 – located on NFS lands with no Forest Service authorization in place. The affected NFS lands will be conveyed to the proponent;
- Beaver Spring – located on NFS lands with no Forest Service authorization in place. The affected NFS lands will be conveyed to the proponent;
- Beaver Pond (a.k.a. Beaver Springs Pond/Lake, Beaver Lake) – located on Mai private property and NFS lands with no Forest Service authorization in place. The storage right ownership in this pond is disputed between the Proponent and the Mais. This scenario is detailed through the inclusion of discussions with the each side's water attorneys in of Exhibit 1 (Proponent) and Exhibit 2 (Mais). The affected NFS lands will be conveyed to the proponent. While we believe it likely that the Mais have a right to water in Beaver Pond, we do not believe that the Mais require an access agreement to this pond from the Proponent as Mais' facilities could be accessed from their own property;
- Hiker Lake – The dam is located on private land owned by the proponent and Vincent Mai. The inundated area is on both private and NFS lands. There is also a feeder ditch from Skyline Creek to Hiker Lake, a small portion of which might cross NFS lands. No Forest Service authorization was issued for either the reservoir or the ditch; however, the affected NFS lands will be conveyed to the proponent.

- Fisherman Lake and Skyline Lake/Pond – appear to be located on private property owned by the proponent and Vincent Mai;
- Cushman Lake – located on private property owned by Alta Investments, LLC.

**Recommendation:**

While the facilities located on NFS lands should have been authorized by the Forest Service, upon completion of the land exchange, they will all be located on private property owned by the exchange proponent, except for those that are currently located also upon the Mai property. As with the Enterprise, Chatauqua and Skyline Main Service Ditches, there is a decreed agreement in place between the proponent and Alta Investments, LLC, for use of the facilities. Because of that, there does not appear to be a need for the proponent to execute easements to Alta Investments, LLC, once the land is conveyed into private ownership.

The exchange will have no effect on the water rights in the system held by Vincent Mai.

**JACKIE SPRING – Owner: Alta Lakes, LLC**

***Water Rights:***

Appropriation Date	Adjudication Date	Amount Decreed (Absolute)	Beneficial Use(s)
07/31/1979	12/31/1984	.05 cfs	Domestic
		.20 cfs (conditional)	Industrial

The 2009 decree for due diligence on the conditional water right states that this spring is part of an “integrated water supply system” for Alta Lakes, LLC. It is located in Section 22, T. 42 N., R. 9 W., NMPM, on Federal Parcel 3D. No Forest Service authorization was issued for the spring.

***Authorizations:***

Because the parcel on which the spring is located will be conveyed to the proponent and the proponent is the water rights holder for the spring, no easement to the new landowner is necessary.

***Recommendation:***

Because the land occupied by the Jackie Spring will be conveyed from private to federal ownership, the proponent might consider a reservation of that spring in the warranty deed that will convey the property to the United States. An operation and maintenance (O&M) will be required, even with the deed reservation.

**KITTLER SPRING NO. 1 – Owner: The Kittler Living Trust*****Water Rights:***

Appropriation Date	Adjudication Date	Amount Decreed (Absolute)	Beneficial Use(s)
07/01/2006	12/31/2006	.5 cfs	Storage (fills augmentation pond)

The CDSS water rights tabulation website did not contain the actual water rights decree for the Kittler Spring; however, the application for the spring submitted by the Kittler Living Trust states that the spring is located in NW<sup>1</sup>/<sub>4</sub>SE<sup>1</sup>/<sub>4</sub>NE<sup>1</sup>/<sub>4</sub> Section 28, T. 42 N., R. 9 W., N.M.P.M. The application also states that “The Kittler Spring Diversion, with a claimed water right of 0.50 cfs conditional, will divert and convey discharge from a spring located on adjacent National Forest Service land, at the point the water flows onto Applicant’s property, into the East Branch of Kittler Creek by way of a ditch, a channel, and pipe or other structure, then to Kittler Diversion No. 3 in order to fill and refill the Kittler Augmentation Pond through Kittler Creek.” The CDSS tabulation does show that a conditional decree was issued on December 31, 2006.

After reviewing the water rights report prepared by Gary Shellhorn, Forest Hydrologist, and using GIS data from the CDSS website, I have come to the conclusion that the Kittler Spring is located on NFS lands just outside the eastern boundary of the Kittler Living Trust. While the spring is located on NFS lands, it could be that no structures are used to convey the water until it flows onto the private property.

***Recommendation:***

The spring is located on NFS lands not associated with the proposed land exchange and, therefore, no recommendations insofar as reservations, agreements, or other documents are needed concerning the land exchange. However, because the spring is located on NFS land and, even if there is no constructed diversion facility in place at the spring, a special use authorization should be issued.

**ELK CREEK PIPELINE – Owner: Wilson Mesa at Telluride Metropolitan District*****Water Rights:***

Appropriation Date	Adjudication Date	Amount Decreed (Absolute)	Beneficial Use(s)
09/01/1989	12/31/1990	.02 cfs	Domestic

What is described as the “decree” in CDSS for the Elk Creek Pipeline is actually the application for the water right. I did not find the actual decree for the pipeline; however, the application states that there are two points of diversion for the pipeline, which is owned by the Wilson Mesa at Telluride Metropolitan District. The first diversion point is on land belonging to the Elk Creek Land Company, LLC. The alternate point of diversion is located on NFS lands, some of which are identified as “Federal Parcel 4” in the Wilson Peak Land Exchange Proposal. That parcel will be conveyed to the proponent at the conclusion of the exchange.

***Authorizations:***

The pipeline is under special use permit to the Wilson Mesa at Telluride Metropolitan District and crosses approximately 1,520 feet of NFS lands.

***Recommendations:***

As stated in the exchange files, the Non-federal Parties will need to execute an easement to the Wilson

Mesa at Telluride Metropolitan District for the portion of pipeline (and access road) now crossing NFS lands and that will be private property after the exchange is completed.

### **COLORADO WATER CONSERVATION BOARD WATER RIGHTS**

On some of the private parcels, there are minimum stream flows decreed for the benefit of the Colorado Water Conservation Board (CWCB). These include:

- Big Bear Creek – Nonfederal Parcel A
- Bilk Creek – Nonfederal Parcel A
- Elk Creek – Nonfederal Parcels A and B

Because there are no diversion structures for these water rights, no protections need to be included in the warranty deeds. Any future diversions in the creeks would be junior to these rights under Colorado water law.

*/s/ Linda K. Bledsoe*

